IN THE

Supreme Court of the United States

Term

No. 74-1427

THE COMMISSIONER OF REVENUE
OF THE STATE OF MINNESOTA
(Formerly Commissioner of Taxation),

Respondent,

vs.

REUBEN L. ANDERSON-CHERNE, INC.

Appellant.

ON APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

JURISDICTIONAL STATEMENT

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

IN THE

Supreme Court of the United States

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No.

THE COMMISSIONER OF REVENUE
OF THE STATE OF MINNESOTA
(Formerly Commissioner of Taxation),

Respondent,

vs.

REUBEN L. ANDERSON-CHERNE, INC.

Appellant.

ON APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

JURISDICTIONAL STATEMENT

(a) The Final Decree of the Minnesota Supreme Court appealed from is reported in 226 NW2, 611. The Minnesota citation is not yet available.

(b)

(i) The Appellant (The Relator in the State Court), a Minnesota corporation, in paying its taxes to the State of Minnesota for its fiscal years ending on March 31st, 1968, 1969 and 1970 included, as required by Chapter 290 Minnesota

Statutes, as taxable income interest on United States bonds in the following respective amounts: $23,179.00, $45,874.00 and $93,880.00.

Appellant petitioned the Respondent for his Order refunding to Appellant the following respective amounts: $2,512.85, $3,134.53 and $2,391.96 representing the dollar portion of the taxes it paid resulting from the inclusion in its returns for those respective years of the United States bond interest asserting that such income was immune, under Title 31, Section 742 U.S.C.A., from taxation by the state.

The Respondent by Order denied Appellant's Petition. The order denying was appealed to the State Tax Court which affirmed that Order. The Decision of the Tax Court was reviwed by the State Supreme Court by way of a Writ of Certiorari, and it sustained the Tax Court, and it is from that Decree of the Supreme Court that this appeal is taken.

This appeal is brought pursuant to U.S.C.A. Title 31 Section 1257 (2).

(ii) The Decree appealed from is dated February 14, 1975 on which date it was made and entered.

The Notice of Appeal was served on Louis Plutzer, Deputy Commissioner of Revenue, on the 21st day of April 1975, and, with Proof of Service attached, was filed with the Clerk of the Supreme Court of Minnesota on the 22nd day of April, 1975.

(iii) U.S.C.A. Title 31, Section 1257:

"Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

(iiii) *Richfield Oil Corporation vs. California*, 67 S.Ct. 156, 329 U. S. 69, 91 L. Ed. 80; *Society for Savings in City of Cleveland, Ohio vs. Bowers*, 75 S. Ct. 607, 349 U.S. 143, 99 L.Ed. 950; *Northwestern Mutual Life Insurance Co. vs. State of Wisconsin*, 48 S.Ct. 55, 275 U.S. 136, 72 L.Ed. 202.

M.S.A. 290.02

"An annual excise tax is hereby imposed upon every domestic corporation, except those included within Section 290.03, for the privilege of existing as a corporation during any part of its taxable year, and upon every foreign corporation, except those included within section 290.03, for the grant to it of the privilege of transacting or for the actual transaction by it of any local business within this state during any part of its taxable year, in corporate or organized form.

The tax so imposed shall be measured by such corporations' taxable net income for the taxable year for which the tax is imposed, and computed in the manner and at the rates provided in this chapter."

M.S.A. 290.03.

"An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both:

Business within the state shall not be deemed to include transportation in interstate or foreign commerce, or both,

by means of ships navigating within or through waters which are made international for navigation purposes by any treaty or agreement to which the United States is a party;

(2) Resident and non-resident individuals;

(3) Estates of decedents, dying domiciled within or without this state; and,

(4) Trusts (except these taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations."

M.S.A. 290.08

Subdivision 1.

"The following items shall not be included in gross income, provided that the amount of any item which was excluded in arriving at gross income under the provisions of section 290.01, subdivision 20, shall not be again excluded under this section."

Subdivision 7.

"Interest upon obligations of the State of Minnesota, any of its political or governmental subdivisions, any of its municipalities, or any of its governmental agencies or instrumentalities;"

Subdivision 8.

"Interest upon obligations of the United States, its possessions, its agencies, or its instrumentalities, so far as immune from state taxation under federal law;"

Subdivision 13.

"Subdivisions 4, 5, 10 and 11 shall not apply to corporations and subdivisions 7 and 8 shall not apply to corporations taxable under section 290.02 or under section 290.361."

(c)

(i) Does U.S.C.A. Title 31, Section 742 authorize the State of Minnesota to compel the inclusion of interest received on U. S. bonds in computing a tax imposed on a corporation under Section 290.02 Minnesota Statutes for the privilege of doing business as a corporation and which tax is computed solely on the income of the corporation?

(ii) Was the tax imposed by M.S.A. 290.02 on Appellant's privilege of existing and doing business as a corporation a property tax?

(iii) Or as stated by the Supreme Court of Minnesota:

"Does 31 U.S.C.A., Section 742 which forbids the state to include interest income on United States Government obligations in its computation of any tax other than a nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed upon corporations, forbid the inclusion of such income in a Minnesota corporations' net taxable income for the purpose of computing the so-called franchise tax imposed by Section 290.02?"

(d) A further statement of the case would be repetitious of the facts stated under (b) (i).

(e) Appellant asserts that any act which permits a state to impose a tax upon the receipt of interest on United States bonds reduces the number of prospective purchasers and the marketability of such bonds and is of substantial importance to the United States.

From the standpoint of the Appellant there is a loss with relation to the three tax years involved of the sum of $8,039.36, which is of substantial importance to the Appellant.

There is pending concurrently before the Tax Court the appeal of Anderson-Cherne Realty, Inc. for tax refunds for the same reason for the tax years ending March 31, 1969 and March 31, 1970 in the amount of $403.92 for the tax year ending March 31, 1969 and $406.75 for the tax year ending March 31, 1970.

On March 21, 1975 the Appellee filed a Deficiency Assessment against Appellant for $16,428.00 resulting from the failure of Appellant to include in its computation of taxes for the year ending March 31, 1971 interest received on United States securities. This matter has been appealed to the Tax Court and by consent of Counsel is to be held in abeyance waiting the result of the current appeal.

The total of the foregoing, is $25,278.03 and is substantial and important to Appellant.

(g) Copies of the Decrees of the State Supreme Court and of the Minnesota Tax Court are attached.

(j) Attached is a copy of the Notice of Appeal that was filed with the Clerk of the Minnesota Supreme Court on April 22, 1975.

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STATE OF MINNESOTA
TAX COURT

REUBEN L. ANDERSON-CHERNE, INC.,
Appellant,
vs.
THE COMMISSIONER OF TAXATION,
Appellee.

Docket Nos. 1737, 1738, 1739

ORDER ENTERED DECEMBER 20, 1973

This is an appeal from the Commissioner's Order denying refund claims by appellant for the fiscal years ending in 1968, 1969, and 1970. The issues for all three years are the same. For each year the taxpayer received interest income from United States Treasury notes and other obligations of the United States. The income from such securities was included in the income tax returns of appellant. The appellant then filed claims for refunds for each of the years in question, claiming the income therefrom to be not includable by reason of Minn. Stat. 290 and to be exempt under The Provisions of Title 31, U.S.C.A. Section 742.

Lewis L. Anderson appeared for appellant, as attorney, C. H. Luther, Deputy Attorney General, for appellee.

DECISION

The Commissioner's Order dated September 24, 1971, is hereby affirmed.

FINDINGS OF FACT

Duane M. Peterson

1. Appellant Reuben L. Anderson-Cherne, Inc. is a Minnesota corporation engaged in the business of mechanical contracting. Its principal office is in Minneapolis, Minnesota.

2. During the fiscal year ended March 31, 1968, appellant received interest income from United States Treasury notes and other obligations of the United States in the amount of 22310.

3. During the fiscal year ended March 31, 1969, appellant received interest income from United States Treasury notes and other obligations of the United States in the amount of $45.874.

4. During the fiscal year ended March 31, 1970, appellant received interest income from United States Treasury notes and other obligations of the United States in the amount of $93,880.

5. Appellant filed tax returns with the Commissioner of Taxation of the State of Minnesota, pursuant to the provisions of Minn. Stat., Chapter 290, for each of its fiscal years ended March 31, 1968; March 31, 1969; and March 31, 1970. Copies of said returns are contained in the Commissioner of Taxation's Return filed with the Tax Court herein and are hereby incorporated herein by reference. The respective amounts of $22,310 for the 1968 taxable year, $45,874 for the 1969 taxable year, and $93,880 for the 1970 taxable year, as indicated in paragraphs 2, 3 and 4 in the foregoing, were included in appellant's taxable income in its Minnesota tax returns for those respective taxable years.

6. Under date of June 4, 1971, appellant filed claims for refund with respect to its taxable years ended March 31, 1968; March 31, 1969; and March 31, 1970; claiming that said amounts set forth in paragraphs 2, 3, and 4 are not includable in taxable income under Minn. Stat., Chapter 290, and are exempt from taxation by the State of Minnesota under the provisions of Title 31, Section 742, U.S.C.A., as amended. Copies of said claims for refund are contained in the Commissioner

of Taxation's Return filed with the Tax Court herein and are hereby incorporated herein by reference.

7. Under date of September 24, 1971, the Commissioner of Taxation issued its Orders denying appellant's claims for refund as described in paragraph 6, which Orders are the subject of these appeals. Copies of said Orders are contained in the Commissioner of Taxation's return filed with the Tax Court herein and are incorporated herein by reference.

CONCLUSIONS OF LAW

Interest income from United States Treasury notes is includable in the income of a corporation whose franchise tax under 290.02 is measured by its net income.

The briefs in this matter presented the Court with an excellent expose of the positions of the parties herein. It is seldom that the Court sees such succinct and accurate statements and citations. Both counsel are to be commended for their diligent work in presenting this case.

MEMORANDUM

1. Is the appellant taxable under Minn. Stat. 290.02 or 290.03?[1]

It is clear that the State may and does tax under Minn. Stat. 290.02 all domestic corporations not exclusively engaged in foreign or interstate commerce. Although the Stipulation does not allude to the kind of activity conducted by appellant, the return shows that the appellant is a domestic corporation doing mechanical contracting. It seems to the Court that in the absence of stipulated evidence to show that appellant is exclusively engaged in interstate or foreign commerce, the taxpayer has waived any claim to that statute.[1]

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[1] In the event appellant feels it can prove that it engages exclusively in interstate or foreign commerce, the Tax Court would be inclined to rule favorably on a motion to reopen this case to hear evidence on that point. See Rule XVI Tax Court Rules & Regulations.

2. Is the tax on income of a corporation under Minn. Stat. 290.02 a property tax or an excise tax?

The Supreme Court has clearly ruled in cases interpreting the law, as it existed prior to 1947, that the franchise tax of Minn. Stat. 290.02 is a property tax and not an excise tax. *State vs. Duluth, Missabe & Northern Railway Co.*, 207 Minn. 618, 292 N.W. 401; *Pullman Co. vs. Commissioner of Taxation*, 223 Minn. 96, 25 N.W. (2d) 838; *Bemis Bros. Bag Co. vs. Wallace*, 197 Minn. 216, 266 N.W. 690; and *State vs. Duluth G. & W. Co.*, 76 Minn. 103, 78 N.W. 1032.

In the case of *Western Union Telegraph Co. vs. Spaeth*, 232 Minn. 128, 44 N.W. (2d) 440, the Court noted that the legislature had not changed the statute which had been construed by the above decisions until 1947. (In 1947 the legislature added the word "excise" to describe the annual tax.) The Supreme Court in the Western Union case refused to treat the 1941, 1942, and 1943 taxes as excise, saying that to do so would be to give retroactive effect to the 1947 Statutory Amendment.

This Court is not impressed with the method used by the legislature to change the tax from a property tax to an excise tax. It seems to us that if the language of the statute imposed a tax on the "property" of the "privilege of doing business" prior to the Amendment, it still imposes the same type of tax in spite of the addition of the word "excise" to the statute. We are, however, constrained by the language of the Western Union case to believe that the Supreme Court will interpret the modification to mean that the legislative intent is now clear that Minn. Stat. 290.02 is an excise tax, and that the legislature can make it an excise merely by saying so. We, therefore, hold that Minn. Stat. 290.02 is an excise tax and not a property tax.

3. Is interest on Federal Government bonds exempt income

in the determination of appellant's tax liability by virtue of 31 U.S. Code 742 and/or Minn. Stat. 290.08?

It clearly appears that the deductibility of Federal Securities interest under Minn. Stat. 290.08 does not apply to domestic corporations taxable under Minn. Stat. 290.02—See Minn. Stat. 290.08, Subd. 13.

The question there is whether or not the tax imposed by Minn. Stat. 290.02 is a nondiscriminatory franchise tax which is excepted from the exemption from State taxes decreed by 31 U.S. Code 742 . . .

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise *or other nonproperty taxes in lieu thereof imposed on corporations* and except estate . . . (Emphasis supplied.)

Neither the Court nor either counsel have been able to find a case directly in point on this question. The State's position is that an "income tax" which is called a "franchise tax" is a "nondiscriminatory franchise tax". One could easily agree that it is nondiscriminatory in that it is not an attempt to circumvent the tax exempt status of Federal Securities and that it treats all corporations equally. The practice, however, of legislative labeling of a tax as one thing while its plain meaning is something different seems to invite judicial disapproval. Our Court has, however, clearly approved the practice in *Duluth-Superior Dredging Co. vs. Commissioner of Taxation*, B.T.A., Docket 251, April 11, 1946, in language which stated:

As pointed out by the Commissioner, Taxpayer is not being taxed on its income, which includes this interest, but under Section 2 is taxed upon the exercise of its franchise measured by its net income.

The Federal case of *Northwestern Mutual Life Ins. Co. vs. Wisconsin*, 275 U.S. 136, 48 S.Ct. 55, 72 L.Ed. 202 (1927), held that the taxation of Federal Securities income was contrary to 31 U.S.C.A. 742.

A later case, however, of *Werner Machine Co. vs. New Jersey*, 350 U.S. 492, 76 S.Ct. 534, sustained a New Jersey franchise tax based on the corporation's net worth, which included the value of certain Federal bonds. This apparently reflects the 1959 Amendment of 31 U.S.C.A. 742, when the exception of nondiscriminatory franchise taxes was added.

We must, therefore, conclude that the Federal Securities income in this case is includable in taxpayer's income.

MINNESOTA TAX COURT

Duane M. Peterson

John Knapp

Mr. Earl B. Gustafson did not participate in this decision.

No. 279, Tax Court, Knutson, J.

REUBEN L. ANDERSON-CHERNE, INC.,

Relator,

44816 vs.

COMMISSIONER OF TAXATION OF THE STATE OF MINNESOTA,

Respondent.

Endorsed
Filed February 14, 1975
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

Corporate Franchise tax imposed by Minn. St. 1971, § 290.02, which utilizes net income as a measuring stick for determining the value of exercising the corporate franchise in the State of Minnesota and which permits the inclusion of interest income on United States government obligations in the computation of net income, does not violate 31 USCA, § 742, which forbids the states to consider interest on such obligations in the computation of any tax other than a nondiscriminatory corporate franchise tax or other nonproperty tax imposed in lieu thereof.

Affirmed.

Heard before Otis, Kelly, Todd, Yetka, and Knutson, JJ., and considered and decided by the court en banc.

OPINION

KNUTSON, Justice.*

* Retired Chief Justice acting pursuant to Minn. St. 2.724.

Certiorari on the relation of Reuben L. Anderson-Cherne, Inc., to review an order of the Minnesota Tax Court denying relator's application for a refund of taxes paid pursuant to Minn. St. 1971, § 290.02, for the years 1968, 1969, and 1970.

The following facts have been stipulated:

"I

"Appellant Reuben L. Anderson-Cherne, Inc. is a Minnesota corporation engaged in the business of mechanical contracting. Its principal office is in Minneapolis, Minnesota.

"II

"During the fiscal year ended March 31, 1968, Appellant received interest income from United States Treasury notes and other obligations of the United States in the amount of $22,310.

"III

"During the fiscal year ended March 31, 1969, Appellant received interest income from United States Treasury notes and other obligations of the United States in the amount of $45,874.

"IV

"During the fiscal year ended March 31, 1970, Appellant received interest income from United States Treasury notes and other obligations of the United States in the amount of $93,880.

"V

"Appellant filed tax returns with the Commissioner of Taxation of the State of Minnesota, pursuant to the provisions of Minn. St., Chapter 290, for each of its fiscal years ended March 31, 1968, March 31, 1969, and March 31, 1970. Copies of said returns are contained in the Commissioner of Taxation's Return filed with the Tax Court

herein and are hereby incorporated herein by reference. The respective amounts of $22,310 for the 1968 taxable year, $45,874 for the 1969 taxable year, and $93,880 for the 1970 taxable year, as indicated in paragraphs II, III and IV above, were included in Appellant's taxable income in its Minnesota tax returns for those respective taxable years.

"IV

"Under date of June 4, 1971, Appellant filed claims for refund with respect to its taxable years ended March 31, 1968, March 31, 1969, and March 31, 1970, claiming that said amounts set forth in paragraphs II, III and IV above are not includible in taxable income under Minn. St., Chapter 290, and are exempt from taxation by the State of Minnesota under the provisions of Title 31, Sec. 742, U.S.C.A. as amended. * * *"

Minn. St. 1971, § 290.02, reads:

"An annual excise tax is hereby imposed upon every domestic corporation, except those included within section 290.03, for the privilege of existing as a corporation during any part of its taxable year, and upon every foreign corporation, except those included within section 290.03, for the grant to it of the privilege of transacting or for the actual transaction by it of any local business within this state during any part of its taxable year, in corporate or organized form.

"The tax so imposed shall be measured by such corporations' taxable net income for the taxable year for which the tax is imposed, and computed in the manner and at the rates provided in this chapter."

It is relator's contention that its income from interest on United States government securities cannot be included in de-

termining net income for the purpose of computing the taxes imposed under § 290.02. The interest from Federal securities is exempt from our state income tax under Minn. St. 290.08, subd. 8. It is also exempt from Federal taxation under 31 USCA, § 742, unless it comes within the exception found in that statutory provision.

The only question before us in this case may be stated as follows: Does 31 USCA, § 742, which forbids the state to include interest income on United States government obligations in its computation of any tax other than nondiscriminatory franchise or other non-property taxes in lieu thereof imposed upon corporations, forbid the inclusion of such income in a Minnesota corporation's net taxable income for the purpose of computing the so-called franchise tax imposed by § 290.02?

The governing Federal statute, 31 USCA, § 742, reads:

> "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes."

The relator does not contend that the tax imposed by Minn. St. 1971, § 290.02, is discriminatory but contends that it is an income or property tax rather than a franchise tax.

The Tax Court held that income from interest on Federal securities was includable in the net income of a corporation for the purpose of determining the amount of tax due under § 290.02. It said in part:

> "* * * The State's position is that an 'income tax' which is called a 'franchise tax' is a 'nondiscriminatory franchise tax'. One could easily agree that it is nondiscriminatory in that it is not an attempt to circumvent the tax exempt status of Federal Securities and that it treats all corporations equally. The practice, however, of legislative labeling of a tax as one thing while its plain meaning is something different seems to invite judicial disapproval. Our Court has, however, clearly approved the practice in Duluth-Superior Dredging Co. vs. Commissioner of Taxation, B.T.A., Docket 251, April 11, 1946 * * *.
>
> * * *
>
> "The Federal case of Northwestern Mutual Life Ins. Co., vs. Wisconsin 275 U. S. 136, 48 S. Ct. 55, 72 L. Ed. 202 (1927), held that the taxation of Federal Securities income was contrary to 31 U.S.C.A. 742.
>
> "A later case, however, of Werner Machine Co. vs. New Jersey, 350 U. S. 492, 76 S. Ct. 534, sustained a New Jersey franchise tax based on the corporation's net worth, which included the value of certain Federal bonds. This apparently reflects the 1959 Amendment of 31 U.S.C.A. 742, when the exception of nondiscriminatory franchise taxes was added.
>
> "We must, therefore, conclude that the Federal Securities income in this case is includable in taxpayer's income."

Relator relies on *State v. Duluth, M. N. Ry. Co.*, 207 Minn. 618, 292 N. W. 401 (1939), certiorari denied, 311 U. S. 719, 61 S.Ct. 439, 85 L.Ed. 468 (1941); *The Pullman Co. v. Commr. of Taxation*, 223 Minn. 96, 25 N. W. 2d 838 (1947); and *Milwaukee Motor Transp. Co. v. Commr. of Taxation*, 292 Minn. 66, 193 N. W. 2d 605 (1971).

It is true that in the first two cited cases we held that the tax imposed was a property tax. However, these cases are not controlling here. They considered the statute prior to 1947, when the legislature amended Minn. St. 1945, § 290.02, to provide that the tax was an excise tax. See, *Western Union Tel. Co. v. Spaeth*, 232 Minn. 128, 44 N. W. 2d 440 (1950). The case of *The Pullman Co. v. Commr. of Taxation, supra*, contains a persuasive dissent by three members of the court as then composed in which the difference between a franchise tax and a property tax is clearly stated in the following language:

> "There can be no doubt that a state may impose constitutionally upon a foreign corporation engaged in interstate and intrastate transportation a tax for the privilege of carrying on the intrastate business measured by a percentage of the income therefrom, even though the carrier uses the same instrumentalities and employes in conducting both kinds of commerce and pays a state ad valorem tax on those instrumentalities. [Citations omitted.] The two taxes relate to distinct and different subjects. The subject of an ad valorem tax is property, and that of an excise tax is a right or privilege." 223 Minn. 110, 25 N. W. 2d 846.

In the Milwaukee Motor case, we did refer to the tax somewhat interchangeably as a franchise and income tax. The nature of the tax was not an issue in that case; the only question was whether the two corporations involved were one and the same rather than two separate corporations. While we may have referred to the tax as an income tax rather imprecisely, what we were dealing with was the franchise tax and not an

income tax. Relator has cited us no case holding directly that the tax under § 290.02 is an income tax.[1]

The United States Supreme Court has stated the general rule that a tax is a franchise tax rather than an income tax if it requires that the earning of the income and the exercising of the privilege of doing business in corporate form coincide before imposing tax liability. See, *Educational Films Corp. v. Ward*, 282 U. S. 379, 51 S.Ct. 170, 75 L.Ed. 400, 71 A. L. R. 1226 (1931); *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 S.C. 342, 55 L.Ed. 389 (1911).

The controlling Federal statute, 31 USCA, § 742, was amended in 1959 so as to include the language now found in it which permits the inclusion of income on Federal obligations for the purpose of determining the amount of a nondiscriminatory franchise tax. Prior to the amendment the statute read: "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

If the contention of relator is tenable, the amendment of the Federal act so as to permit the inclusion of income from Federal obligations in determining the amount of "nondiscriminatory franchise or other nonproperty taxes" would be completely meaningless.

Without going into a lengthy discussion on the subject, we are convinced that the Tax Court correctly held that the tax involved in this case is not levied on the income from interest on government securities as such, but was, in fact, a franchise

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[1] We note that the legislature, in L. 1974, c. 556, § 18, amended Minn. St. 1971, § 290.02, by striking the word "excise" and inserting the word "income" to describe the tax imposed by § 290.02. Whatever the effect of the amendment may be, as to which we express no opinion, it is not applicable to this case.

tax imposed upon the privilege of operating as a corporation. The inclusion of interest on Federal securities in determining net income of the corporation is used only as a measuring stick to compute the amount of a franchise tax due under Minn. St. 1971, § 290.02. As such, it is permissible under 31 USCA, § 742.

Affirmed.

44816

STATE OF MINNESOTA
IN SUPREME COURT

THE COMMISSIONER OF REVENUE OF
THE STATE OF MINNESOTA
(Formerly Commissioner of Taxation),

Respondent,

vs.

REUBEN L. ANDERSON-CHERNE, INC.,

Relator.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Reuben L. Anderson-Cherne, Inc., the Relator above named hereby appeals to the Supreme Court of the United States from the Final Decree of the Supreme Court of the State of Minnesota entered in this matter on February 14, 1975 affirming the Order of the Tax Court of the State of Minnesota sustaining the refusal of the Respondent to refund to Relator that portion of Relator's taxes which it had paid to the State of Minnesota for the tax years ending March 31, 1968, 1969 and 1970 based upon interest Relator had received on United States bonds.

This appeal is taken pursuant to 28 U.S.C.A. 1257 (2).

II. The Clerk will please prepare a transcript of the record in the cause for transmission to the Clerk of the Supreme Court and include in said transcript the following:

(a) The return of the Respondent, Commissioner of Taxation, to the Tax Court and which was included in the record of that Court certified to the above Court:

(b) The stipulation of facts by Counsel for the parties dated the 13th day of December, 1971;

(c) Relator's Brief and Appendix;

(d) Respondent's Brief;

(e) Copy of the Court's Decree filed and entered on February 14, 1975.

III. The following questions are presented by this appeal:

Does U.S.C.A. Title 31, Section 742 Authorize the State of Minnesota to compel the inclusion of interest received on United States bonds in computing a tax imposed on a corporation for the privilege of doing business as a corporation and which tax is computed solely on the income of the corporation?

Was the tax imposed by Minnesota Statutes Chapter 290 on Appellant's privilege of existing as and doing business as a corporation a property tax?

Does the tax imposed on corporations by M.S.A. 290.02 discriminate against said corporations as compared to the tax imposed on corporations by M.S.A. 290.03?

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1427

REUBEN L. ANDERSON-CHERNE, INC.,
Appellant,

vs.

THE COMMISSIONER OF REVENUE
OF THE STATE OF MINNESOTA,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF MINNESOTA

MOTION TO DISMISS AND SUPPORTING BRIEF

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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1427

REUBEN L. ANDERSON-CHERNE, INC.,
Appellant,

vs.

THE COMMISSIONER OF REVENUE
OF THE STATE OF MINNESOTA,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF MINNESOTA

MOTION TO DISMISS AND SUPPORTING BRIEF

MOTION TO DISMISS

The Commissioner of Revenue of the State of Minnesota, appellee herein, moves pursuant to Rule 16(1) (b) of the Rules of this Court to dismiss the appeal on the ground that it does not present a substantial federal question.

BRIEF IN SUPPORT OF MOTION

In its Jurisdictional Statement appellant has indicated that there are three questions presented by this appeal. Actually there is only one question which is appealable under 12 U.S.C. § 1257(2), viz:

> Does 31 U.S.C. § 742,[1] which forbids a state to include interest on United States Government obligations in the computation of any tax other than a nondiscriminatory franchise or other nonproperty tax in lieu thereof imposed on corporations, forbid the inclusion of such interest in computing the nondiscriminatory franchise tax imposed on corporations under Minnesota Statutes 290.02?

This is the question that was litigated in this case and was decided in the negative by the Minnesota Supreme Court. In its Jurisdictional Statement, appellant has stated this same question in two different ways, in (c)(i) and (c)(iii), but it is still one and the same question.

Appellant has also stated a second question, in (c)(ii), namely:

> "(ii) Was the tax imposed by M.S.A. 290.02 on Appellant's privilege of existing and doing business as a corporation a property tax?"

[1] 31 U.S.C. § 742 reads as follows:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, *except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations* and except estate taxes or inheritance taxes. (Emphasis supplied.)

That is not an appealable question under 12 U.S.C. § 1257 (2), as it merely involves the construction of the Minnesota statute, and does not draw in question the validity of the statute on the ground of its being repugnant to the Constitution or laws of the United States. The Minnesota Supreme Court has held that the statute does not impose a property tax,[2] and in the construction of a state statute, the state court's views are not reviewable by the Supreme Court.[3]

31 U.S.C. § 742 clearly permits the inclusion of interest on United States obligations in the computation of a nondiscriminatory franchise tax imposed on corporations.[4]

[2] Jurisdictional Statement, pp. A-12, 13, 14.

[3] *Michigan v. Michigan Trust Co.*, 286 U.S. 334 (1932).

[4] 31 U.S.C. § 742 reflects the position of this Court as enunciated in a number of decisions. For example, in *Werner Machine Co. v. New Jersey*, 350 U.S. 492 (1956), the Court sustained a New Jersey franchise tax based upon the corporation's net worth, which included the value of some federal bonds. The Court said:

> Appellant argues further that even if this is a franchise tax, it must fall because its effect is the same as if it had been imposed directly on the tax-exempt federal securities. Since the tax remains the same whatever the character of the corporate assets may be, no claim can be sustained that this taxing statute discriminates against the federal obligations. And since this is a tax on the corporate franchise, it is valid despite the inclusion of federal bonds in the determination of net worth. *This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property.* See, e.g., Society for Savings v. Coite, 6 Wall. 594, 18 L.Ed. 897; Provident Institution for Savings v. Massachusetts, 6 Wall. 611, 18 L.Ed. 907; Hamilton Co. v. State of Massachusetts, 6 Wall. 632, 18 L.Ed. 904; Home Ins. Co. of New York v. State of New York, supra; Educational Films Corp. of America v. Ward, supra; Pacific Co. v. Johnson, supra. (Emphasis added.)

And the Minnesota Supreme Court has clearly held that:

> [T]he tax involved in this case is . . . in fact, a franchise tax imposed upon the privilege of operating as a corporation. The inclusion of interest on Federal securities in determining net income of the corporation is used only as a measuring stick to compute the amount of a franchise tax due under Minn. St. 1971, § 290.02. As such, it is permissible under 31 U.S.C.A. § 742. (Jurisdictional Statement, pp. A-13, 14.)

Under these circumstances, where the federal law (31 U.S.C. § 742) is clear and its application to the Minnesota statute in issue is clear, there is, we submit, no substantial federal question presented by this appeal, and it should be dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1427

REUBEN L. ANDERSON-CHERNE, INC.,
Appellant,

vs.

THE COMMISSIONER OF REVENUE
OF THE STATE OF MINNESOTA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

BRIEF OF APPELLANT

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

BRIEF OF APPELLANT

FACTS

This is an appeal from the decision of the Supreme Court of Minnesota made and entered on February 14, 1975 and reported in 226 N.W. 2d, Page 611. The Minnesota Reports citation is not yet available.

The decision appealed from is reported in full on Pages A-7 through A-14 of the Jurisdictional Statement.

The decision sustained the Order of the Tax Court of Minnesota entered on December 20, 1973 and this order is printed in full on Pages A-1 through A-6 of said Jurisdictional Statement.

The Appellant here was Appellant before the Tax Court and the Relater before the State Supreme Court.

The Appellant, a Minnesota corporation, during its tax years ending March 31, 1968, 1969 and 1970 received interest on United States securities in the following successive amounts: $23,179.00, $45,874.00 and $93,880.00.

It reported these receipts in its state tax returns filed pursuant to Minnesota Statutes 290.02. Appellant thereafter petitioned Appellee for the refund of the following respective sums: $2,512.85, $3,134.53 and $2,391.96, the dollar portion of the taxes paid for those respective years resulted from the inclusion in its taxable income of the interest received on the United States securities, asserting that the receipt of such income was not subject to taxation by the state. Appellee denied Appellant's request. The Tax Court and the Supreme Court of Minnesota sustained that position.

The tax imposed on Appellant and paid by it is measured, determined and computed solely upon the "taxable net income" of Appellant.

The Minnesota Statutes involved are as follows:

M.S.A. 290.02. An annual excise tax is hereby imposed upon every domestic corporation, except those included within section 290.03, for the privilege of existing as a corporation during any part of its taxable year, and upon every foreign corporation, except those included within section 290.03, for the grant to it of the privilege of transacting or for the actual transaction by it of any local business within this state during any part of its taxable year, in corporate or organized form.

The tax so imposed shall be measured by such corporations' taxable net income for the taxable year for which the tax is imposed, and computed in the manner and at the rates provided in this chapter.

M.S.A. 290.03. An annual tax for each taxable year computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commence, interstate commerce, or both; * * * * *;

M.S.A. 290.08. Subd. 1. The following items shall not be included in gross income, provided that the amount of any item which was excluded in arriving at gross income under the provisions of section 290.01, subdivision 20, shall not be again excluded under this section.

Subd. 7. Interest upon obligations of the State of Minnesota, any of its political or governmental subdivisions, any of its municipalities, or any of its governmental agencies or instrumentalities.

Subd. 8. Interest upon obligations of the United States, its possessions, its agencies, or its instrumentalities, so far as immune from state taxation under federal law; provided, that salaries, wages, fees, commissions or other compensation received from the United States, its possessions, its agencies, or its instrumentalities shall be excluded from gross income for all taxable years ending prior to January, 1939; provided, that salaries, wages, fees, commissions, or other compensation received from the United States, its possessions, its agencies, or its instrumentalities for taxable years ending prior to January 1, 1939, shall be excluded only to the extent that salaries, wages, commissions, fees and other compensation

received from the State of Minnesota, its political or governmental subdivisions, its municipalities, or its governmental agencies or instrumentalities for that year are excluded from gross income under the federal revenue acts; provided, that salaries, wages, fees, commissions, or other compensation received from the United States, its possessions, its agencies, or its instrumentalities by federal employees residing in "federal areas" shall be excluded from gross income for all taxable years ending prior to January 1, 1941.

Subd. 13. Subdivisions 4, 5, 10 and 11 shall not apply to corporations and subdivisions 7 and 8 shall not apply to corporations taxable under section 290.02 or under section 290.361.

The United States Constitution and 31 U.S.C.A. Section 742 are the federal laws involved.

U.S.C.A. 742. "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other non-property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes."

Under the constitution the United States has had granted to it certain specific powers including the power to finance its own operations and obligations.

By stipulation the parties agreed to the following facts:

"I.

"Appellant Reuben L. Anderson-Cherne, Inc. is a Minnesota corporation engaged in the business of mechanical contracting. Its principal office is in Minneapolis, Minnesota.

"II.

"During the fiscal year ended March 31, 1968, Appellant received interest income from United States Treasury notes and other obligations of the United States in the amount of $22,310.

"III.

"During the fiscal year ended March 31, 1969, Appellant received interest income from United States Treasury notes and other obligations of the United States in the amount of $45,874.

"IV.

"During the fiscal year ended March 31, 1970, Appellant received interest income from United States Treasury notes and other obligations of the United States in the amount of $93,880.

"V.

"Appellant filed tax returns with the Commissioner of Taxation of the State of Minnesota, pursuant to the provisions of Minn. St., Chapter 290, for each of its fiscal years ended March 31, 1968, March 31, 1969, and March 31, 1970. Copies of said returns are contained in the Commissioner of Taxation's Return filed with the Tax Court herein and are hereby incorporated herein by reference. The respective amounts of $22,310 for the 1968 taxable year, $45,874 for the 1969 taxable year, and $93,880 for the 1970 taxable year, as indicated in paragraphs II, III and IV above, were included in Appellants' taxable in-

come in its Minnesota tax returns for those respective taxable years.

"VI.

"Under date of June 4, 1971, Appellant filed claims for refund with respect to its taxable years ended March 31, 1968, March 31, 1969, and March 3, 1970, claiming that said amounts set forth in paragraphs II, III and IV above are not includible in taxable income under Minn. St., Chapter 290, and are exempt from taxation by the State of Minnesota under the provisions of Title 31, Sec. 742, U.S.C.A. as amended. * * *"

QUESTION

Does U.S.C.A. Title 31, Section 742 authorize the State of Minnesota to include interest received on U. S. securities in computing a tax imposed on a corporation under Section 290.02 Minnesota Statutes for the privilege of doing business as a corporation and which tax is computed solely on the income of the corporation?

ARGUMENT

It is accurate to state that prior to September 22, 1959 when 31 U.S.C.A., Section 742 was amended to read as it now does that interest income on U. S. securities was immune from direct taxation by any state:

Northwestern Mutual Life Insurance Company vs. State of Wisconsin, 275 U.S. 136, 48 S.Ct. 55, 72 L.ed. 202.
McCulloch vs. Maryland, 4 Wheat 316.
Home Savings Bank vs. Des Moines, 205 U.S. 503.

In the *Northwestern Mutual Life Insurance* case you stated in part as follows:

"It cannot be denied (and denial is not attempted) that bonds of the United States are beyond the taxing power of the states. Home Savings Bank vs. City of Des Moines, 205 U.S. 503, 509, 27 S. Ct. 571, 51 L. Ed. 901; Farmers & Mechanics Bank vs. Minnesota, 232 U.S. 516, 34 S. Ct. 354, 58 L. Ed. 706; and First National Bank vs. Anderson, 269 U.S. 341, 347, 46 S. Ct. 135, 70 L. Ed. 295. Certainly since Gillespie vs. Oklahoma, 257 U.S. 501, 505, 42 S. Ct. 171, 66 L. Ed. 338, it has been the settled doctrine here that where the principal is absolutely immune, no valid tax can be laid upon income arising therefrom. To tax this would amount practically to laying a burden on the exempted principal. Accordingly if the challenged act, whatever called, really imposes a direct charge upon interest derived from United States bonds, it is pro tanto void. * * *

"Here the statute undertook to impose a charge of 3 percent upon every dollar of interest received by the company from United States bonds. So much, in any event, the state took from these very receipts. This amounts, we think, to

an imposition upon the bonds themselves and goes beyond the power of the state."

It is also accurate to state that the tax imposed by M.S.A. 290.02 by whatever name it may be labeled, is a direct tax on the receipt of such interest income.

It is also true that prior to September 22, 1959 that this Court had sustained state tax laws which imposed franchise taxes on corporations where the taxes were based on the fair value of a corporation which included in its assets U. S. securities:

Raymond Bag Co. vs. Bowers, 163 Ohio St. 275, 126 N.E. 2d 321, 76 S.Ct. 648, 350 U.S. 1003, 100 L.ed. 866.

Werner Machine Co. vs. Director of Division of Taxation, Department of Treasurer, State of New Jersey "1956", 76 S.Ct. 534, 350 U.S. 492, 100 L.ed. 634.

You also sustained a franchise tax measured by income where said income included royalties received from U. S. copyrights:

Educational Film Corporation vs. Ward, 282 U.S. 379, 51 S.Ct. 170, 75 L.ed. 400.

Or where the franchise tax was measured by the income of the preceding year:

People ex rel. Bass, Ratcliff & Gretton vs. Tax Commission, 266 U.S. 271, 280.

Or where the corporate income included interest income from municipal bonds:

Flint vs. Stone, Tracy Co., 220 U.S. 107, 162.

Or where said tax was based upon income and included in the taxable income are proceeds from transportation in interstate commerce:

Maine vs. Grand Trunk Ry. Co., 142 U.S. 217.

The writer of this brief has found no decision of this Court which has sustained a direct tax by a state on the receipt of interest on United States securities. However, in the case of *Macallen Co. vs. Massachusetts*, 279 U.S. 620, 629, it appears that the State of Massachusetts attempted to impose a tax on interest income from United States bonds, and you held that it could not be done, citing in support of that decision *Northwestern Mutual Life Insurance Company vs. State of Wisconsin, supra*, and in doing so stated:

> "Let it once be conceded that such limitations may be evaded by the adoption of a delusive name to characterize the tax or form words to describe it and the destruction of the inviolability of these necessary safeguards will soon follow."

We come then to the basic and underlying question and that is: Did the Congress by the amendment of Section 742 remove the immunity from taxation by a state on interest income from United States securities?

If Section 742 as amended removed all immunity from such direct taxation, then Appellant should not be here.

If labeling the tax imposed an "excise tax" changes the tax from one imposed and computed solely on income to an "excise tax", in fact, there being no claim of or evidence of discrimination, then Appellant has no business taking the time of this Court.

Or if this Court feels compelled to accept the classification of "excise" placed on the tax by the legislature, although this Court from its own examination recognizes it as an income tax, in fact, Appellant should not be here.

But if the Court concludes that the tax, in fact, is an income tax and not a franchise tax and that the Court is not bound to accept the classification of "excise", then Appellant belongs here and it is entitled to the decree of this Court declaring the tax an income tax and ordering judgment for Appellant against Appellee for the refund of so much of the taxes it paid for the three years resulting from the inclusion in its taxable income of the interest it had received on the United States securities, unless the Court also concludes that the amended Section 742 permits and authorizes a state to impose a direct tax upon the interest income received from U. S. securities.

Respectfully submitted,

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Supreme Court, U. S.
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No. 74-1427

In the Supreme Court of the United States

OCTOBER TERM, 1975

REUBEN L. ANDERSON-CHERNE, INC., APPELLANT

v.

THE COMMISSIONER OF REVENUE OF THE STATE OF MINNESOTA

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
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In the Supreme Court of the United States

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THE COMMISSIONER OF REVENUE OF THE STATE OF MINNESOTA

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's invitation of June 23, 1975, requesting the views of the United States.

Appellant is a Minnesota corporation, with its principal office in Minneapolis, Minnesota, and is engaged in business in that State. It is, and has been, subject to the "annual excise tax * * * imposed [by Minn. Stat. Ann., Section 290.02 (1962) (J.S. 3)] upon every domestic corporation * * * for the privilege of existing as a corporation during any part of its taxable year." As that statute provides, "[t]he tax so imposed shall be measured by such corporations' taxable net income for the taxable year for which the tax is imposed" (J.S. A8-A9).

Appellant filed corporate excise tax returns with the Commissioner of Taxation of Minnesota for its fiscal years ending March 31, 1968, 1969, and 1970, and paid the amounts shown to be due. In those returns, it included in its taxable income for the respective fiscal years $22,310, $45,874, and $93,880, of interest income it had received from United States Treasury notes and other obligations of the United States. In including such interest in its taxable income for purposes of the Minnesota tax, appellant complied with applicable statutory requirements. Although Minn. Stat. Ann., Section 290.08, subdivisions 7 and 8, excludes interest upon obligations of the State of Minnesota and its political subdivisions and of the United States and its instrumentalities, it does so only for purposes of the tax on corporations not subject to the excise tax at issue here. Thus, subdivision 13 of Section 290.08 explicitly provides that the exclusion shall not apply to corporations taxable under Section 290.02 (J.S. A8-A9; J.S. 3-4).

Appellant petitioned the Commissioner of Taxation for refunds for its fiscal years 1968, 1969, and 1970, of $2,512.85, $3,134.53, and $2,391.96, respectively, on the ground that interest from obligations of the United States is immune from state taxation under Section 3701 of the Revised Statutes of the United States, 31 U.S.C. 742. The Commissioner denied a refund (J.S. A2-A3). The Tax Court of the State of Minnesota (J.S. A1-A6) and the Supreme Court of Minnesota (J.S. A7-A14) upheld the Commissioner of Taxation on the ground that Minn. Stat. Ann., Section 290.02, imposed a nondiscriminatory franchise tax, and that Section 3701 of the Revised Statutes excepts a nondiscriminatory franchise tax from the prohibition it otherwise imposes.

1. Section 3701 of the Revised Statutes, as amended, 31 U.S.C. 742, provides as follows:

> All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other non-property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

The first sentence of the statute originated in Section 2 of the Act of February 25, 1862, 12 Stat. 345-346. The second sentence was added by Section 105(a) of the Act of September 22, 1959, 73 Stat. 622.

Even before this statutory enactment, this Court had held in *Weston* v. *City Council of Charleston*, 2 Pet. 449, that obligations of the United States could not, under the Constitution, be subjected to a state or local property tax. See *Society for Savings* v. *Bowers*, 349 U.S. 143, 144.

However, the Court has also held, in an extended series of decisions, that neither the Constitution alone nor Section 3701 as it existed prior to 1959 prohibits a state from measuring a corporate franchise or privilege tax by property or net income that includes obligations of the United States or the interest therefrom. In *Werner Co.* v. *Director of Taxation*, 350 U.S. 492, the Court summarized this series of decisions as follows (350 U.S. at 494):

> And since this is a tax on the corporate franchise, it is valid despite the inclusion of federal bonds in the determination of net worth. This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property. See, *e.g.*, *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Hamilton* v. *Massachusetts*, 6 Wall. 632; *Home Ins. Co.* v. *New York*, *supra*; *Educational Films Corp.* v. *Ward*, *supra*; *Pacific Co.* v. *Johnson*, *supra*.

Similarly, the Court in *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, upheld the federal tax upon doing business in corporate form imposed by Section 38 of the Act of August 5, 1909, 36 Stat. 11, 112, even though it was measured by net income including interest from state obligations.

The 1959 amendment of Section 3701 of the Revised Statutes (31 U.S.C. 742) made no change relevant to this case. In effect, it codified the decisions of this Court when it explicitly excepted nondiscriminatory franchise taxes imposed on corporations. As the legislative history makes clear, the amendment was adopted to counter the position of one state with respect to the inclusion of interest on obligations of the United States in the computation of its net income tax.[1]

---

[1]The pertinent committee reports state as follows:

> Present law provides that obligations of the United States are to be exempt from taxation by or under State or local authority. The Supreme Court has held that this includes the exemption of interest on U.S. obligations from taxation by or under State or local authority. It has been pointed out to your committee, however, that one State has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing "gross income" upon which taxable net income is determined. The bill (sec. 105) makes it clear that the exemption for Federal obligations extends to every form of taxation that would require either the obligation, or the interest on it, or both to be considered directly or indirectly in the computation of the tax, except nondiscriminatory franchise taxes (or other nondiscriminatory non-property taxes imposed in lieu thereof) on corporations and except estate or inheritances taxes. [H.R. Rep. 1148, 86th Cong., 1st Sess., p. 8 1959); S. Rep. No. 909, 86th Cong., 1st Sess., p.8 (1959).]

2. It is therefore clear that if the tax imposed by Minn. Stat. Ann., Section 290.02, is a nondiscriminatory franchise tax, as the courts below held, there is no constitutional or statutory basis for challenging the inclusion of interest from obligations of the United States in the net income that is the measure of the tax.

Appellant appears to have contended, however, that the tax here is not a franchise tax, but a property tax or an income tax (J.S. A4-A6, A10-A14, A15). There is, however, little support for that position. The statute imposes an "annual excise tax." The Supreme Court of Minnesota held that the tax is a franchise tax (J.S. A12-A14). While those categorizations are not necessarily controlling here, there is no reason for rejecting the Minnesota Supreme Court's construction of the statute as imposing a franchise tax. See *Werner Co.* v. *Director of Taxation*, *supra*, 350 U.S. at 493; *Gurley* v. *Rhoden*, No. 73-1734, decided May 12, 1975, slip op. 7-8; cf. *United States* v. *Mississippi State Tax Commission*, No. 74-548, decided June 2, 1975, slip op. 8, 9, n. 7.

The operative terms of the statute define its incidence, and demonstrate the character of the tax. They provide that, with respect to domestic corporations, the tax is upon the privilege of existing as a corporation, and, with respect to foreign corporations, the tax upon the priv-

ilege of doing, or the doing of, local business in corporate form. Such a tax is the very archetype of a franchise tax. See, *e.g. Pacific Co.* v. *Johnson*, 285 U.S. 480, 489-491; *Educational Films Corp.* v. *Ward*, 282 U.S. 379, 385-392; *Flint* v. *Stone Tracy Co.*, *supra*, 220 U.S. at 161-165. See also *Colonial Pipeline Co.* v. *Traigle*, No. 73-1595, decided April 28, 1975.[2]

3. In its notice of appeal (J.S. A15), appellant also claims that the tax discriminates against those corporations subject to this excise tax, as opposed to those corporations subject to the net income tax of Minn. Stat. Ann., Section 290.03. This point was, however, not raised below (J.S. A10). But at all events, appellant's suggestion of discrimination is not relevant to Section 3701 of the Revised Statutes.

The Minnesota statute only makes the distinction required by the constitutional decisions of this Court (see, *e.g., Northwestern Cement Co.* v. *Minnesota*, 358 U.S. 450) between corporations subject to the franchise tax and those corporations subject to a net income rather than a franchise tax because their business consists exclusively of foreign or interstate commerce. Compare Minn. Stat. Ann., Section 290.02, with Section 290.03.

For the reasons stated, this appeal presents no substantial federal question. It is therefore respectfully submitted that the appellee's motion to dismiss the appeal should be granted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

---

[2]Beginning January 1, 1975, Section 290.02 was amended to impose [a]n annual income tax * * * for the privilege of existing as a corporation during any part of its taxable year, and upon every foreign corporation doing business within this state * * * ." Despite the change of terminology from "excise" to "income," the operative terms of the statute are still upon the privilege of exercising the corporate franchise. Thus, the tax is still an excise tax under the criteria of this Court's decisions.